JUN 28 2001

No. 00-758

Supreme Court, U.S.
FILED
JUN 28 2001
OFFICE OF THE CLERK

IN THE

United States Supreme Court

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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June 28, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF CONSENT

Both parties have consented to the filing of this brief. Their letters of consent are filed herewith.

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Letter Carriers, AFL-CIO ("NALC") submits this brief *amicus curiae* to bring to the Court's attention relevant matters not likely to be addressed by the parties. In particular, the brief focuses on the extent to which the decision of the court below accords with the policies of the Postal Reorganization Act ("PRA" or "the Act"), 39 U.S.C. §§ 101 *et seq.*, the statute that both governs Petitioner United States Postal Service ("USPS") and its relations with its employees, and that provided Respondent the right to an appeal to the Merit System Protection Board ("MSPB").

NALC is a national labor organization that, under the PRA, *see* 39 U.S.C. § 1203(a), serves as the exclusive bargaining representative of all city letter carriers employed by USPS, including Respondent. *See generally Air Courier Conf. v. American Postal Workers Union*, 498 U.S. 517 (1991). As bargaining representative for over 200,000 postal letter carriers, NALC's principal concern is their terms and conditions of employment, including the procedural rules governing discharge proceedings. In particular, as bargaining representative under the PRA, NALC has an interest in seeing that such procedural rules accord with the policies of the PRA.

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[1] Pursuant to Rule 37(6) of the Court, NALC states that no counsel for a party in this case authored this brief in whole or in part, and no entity, other than NALC, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The right of preference eligible postal employees like Respondent to appeal a removal to the MSPB arises under the PRA, so MSPB procedures in such removal cases should accord with the policies of the PRA. In enacting the PRA, Congress sought that, whenever possible and appropriate, collectively bargained rules and procedures should govern postal employees. The decision of the court of appeals below furthers that policy by adopting the same procedural rule for postal employees in MSPB cases as is used by labor arbitrators under the NALC-USPS collective bargaining agreement, namely, that prior discipline cannot be considered in a removal case if it has been grieved but not yet arbitrated.

Next, in arguing that discipline its management issues to employees should, pending arbitration, be presumed proper, USPS cites caselaw concerning the acts of government officials. In enacting the PRA, however, Congress deliberately sought to divest USPS management of the mantle of government authority in labor relations, requiring it to bargain with representatives of its employees like a private-sector company. Because the PRA puts USPS on the same plane as a private-sector employer in labor relations matters, no presumption relevant to government action should apply to discipline issued by USPS management.

Finally, by applying the same rule in MSPB cases as applied by labor arbitrators under the NALC-USPS collective bargaining agreement, the court of appeals decision furthers the PRA's policy of protecting the employment rights of veterans. In accordance with 39 U.S.C. § 1005(a)(2), the only postal employees covered by collective bargaining agreements who have the right to appeal a discharge to the MSPB are veterans or employees otherwise deemed "preference eligible," as that term is defined in 5 U.S.C. § 2108(3). Had the court of appeals not required the same favorable procedural rule be applied to preference eligible

USPS employees in MSPB cases as that applied to postal employees under the collective bargaining agreement, it would have put veterans who choose to appeal to the MSPB in a potentially worse position than postal employees who have their cases heard in arbitration, and thus contravened the PRA's veteran protection policy.

ARGUMENT

I. THE COURT BELOW FURTHERED THE POLICIES OF THE PRA BY ADOPTING A RULE CONSISTENT WITH THE COLLECTIVELY BARGAINED PROCEDURE GOVERNING POSTAL EMPLOYEES

As Respondent correctly notes, under the NALC-USPS collective bargaining agreement, labor arbitrators, in reviewing discharge cases, do not consider grieved but not yet arbitrated prior discipline. *See USPS and National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders*, Case No. MC-S-0874-D (1977) (Fasser, Arb.), slip op. at 7 (copy lodged with the Court) (holding, in reversing employee's discharge, that grieved but not yet adjudicated prior discipline "has no standing in this proceeding."); *NALC and USPS*, Case No. E94 N-4E-D 96075418 (1999) (Snow, Arb.), slip op. at 16 (copy lodged with the Court) (citing parties' "past practice of giving unresolved grievances no standing in removal hearings"); *USPS and NALC*, Case No. D90N-4D-D 95076768 (Sickles, Arb.), slip op. at 20 (copy lodged with the Court) (arbitrator will consider case "without reference to the past elements [of discipline], since they have not been resolved and it would be inappropriate to 'hold these matters against the grievant' until there is a final resolution"); *USPS and NALC*, Case No. S1N-3Q-D-26601 (Williams, Arb.), slip op. at 8 (copy lodged with the Court) (arbitrator "cannot consider discipline[ ] which is being adjudicated. If some is reduced or eliminated, it has a definite impact on the past record, progressive discipline, etc.").

The court below applied the same rule to Respondent's MSPB case, namely, that the MSPB cannot consider grieved but not yet arbitrated prior discipline. *See* 212 F.3d 1296, 1300 (Fed. Cir. 2000). By adopting the same rule for MSPB cases as that established through collective bargaining, the court's decision furthers the policies of the PRA.

The policies of the PRA matter in this case because, unlike in other MSPB cases, MSPB cases involving postal employees arise under the PRA. *See Gribcheck v. USPS*, 87 M.S.P.R. 473, 479 (2001); *Hall v. USPS*, 26 M.S.P.R. 233, 236 (1985); *accord Bacashihua v. MSPB*, 811 F.2d 1498, 1501 (Fed. Cir. 1987). Postal employees are generally excluded from the definition of civil service "employee" under 5 U.S.C. § 2105(e). The PRA established USPS as an independent establishment of the executive branch of the federal government, 39 U.S.C. § 201, and structured it like a private-sector enterprise. *See Bacashihua*, 811 F.2d at 1501; *see also Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520, 525 (1984) (in enacting the PRA, Congress "launched [USPS] into the commercial world," so as "to be treated similarly to other self-sustaining commercial ventures"). Congress exempted USPS and its employees from federal civil service law, except as to those "very limited" provisions, *Hall*, 26 M.S.P.R. at 235, that the Act specifically made applicable. *See* 39 U.S.C. § 410(a); *see also Gribcheck*, 87 M.S.P.R. at 477. The PRA further provides that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, which governs private-sector labor relations, *see id.* § 152(2), also governs postal labor relations. *See* 39 U.S.C. § 1209(a); *see also id.* §§ 1202-04; *Hall*, 26 M.S.P.R. at 235; *Bowen v. USPS*, 459 U.S. 212, 232 (1983) (White, concurring) (noting provision of PRA is parallel to § 301 of Labor-Management Relations Act, 29 U.S.C. §185, which applies in private sector).

At the core of its labor relations provisions, the PRA provides for legally-enforceable collective bargaining

agreements between USPS and the unions that represent postal employees. *See* 39 U.S.C. §§ 1206, 1208(b); *see also Gribcheck*, 87 M.S.P.R. at 480 (noting "the central role that collective bargaining plays under [the PRA's] statutory scheme"). The Act expressly permits such collective bargaining agreements to contain binding arbitration provisions, *id.* § 1206(b), such as those contained in the NALC-USPS contract. *See* Article 15 of 1998-2000 NALC-USPS collective bargaining agreement, available at *www.nalc.org/cau/pdf/agreemnt/na1998.pdf*; *see generally Hall*, 26 M.S.P.R. at 235.

The PRA allows application of federal civil service law to postal employee removal cases only to the extent not inconsistent with applicable collective bargaining agreements. 39 U.S.C. § 1005(a)(1)(A). Because an MSPB appeal is inconsistent with binding arbitration under a collective bargaining agreement, postal employees covered by such an agreement generally have no right to an MSPB appeal. *Winston v. USPS*, 585 F.2d 198, 202-06 (7th Cir. 1978); *Hall*, 26 M.S.P.R. at 236. The PRA provides a narrow exception, however, for employees like Respondent, who are veterans or otherwise deemed "preference eligible" under 5 U.S.C. § 2108(3); such employees may appeal to MSPB. *See* 39 U.S.C. § 1005(a)(2). Thus, a postal employee's right to an MSPB appeal arises entirely from the PRA's grant of such a right to preference eligible USPS employees.

Because MSPB cases involving postal employees arise under the PRA, the procedural rules applied in such cases should accord with the PRA's policies. *See Gribcheck*, 87 M.S.P.R. at 480. As the legislative history of the Act makes clear, one of Congress' central goals in enacting the PRA was to have collectively bargained rules and procedures govern the terms of postal employment. Prior to the PRA, a 1962 executive order gave postal employee unions strictly confined collective bargaining rights while expressly preserving for the

then Post Office Department broad and absolute management authority in key areas of operation. *See* Executive Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962). A commission appointed by President Johnson to investigate the then deplorable conditions in the Post Office found that "[m]any of the problems" in the area of postal labor relations "stem from [the executive order's] exclusion from bargaining of most items bargainable between management and labor in the private sector." *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* 20 (1968). The presidential commission urged that these limited bargaining rights "be replaced with full collective bargaining over pay, related benefits and other matters now negotiated in the private sector." *Id.* at 59. In 1969, the year following issuance of the commission's report, numerous bills were introduced in Congress to give postal employees full collective bargaining rights, including rights to a binding grievance-arbitration procedure. *See, e.g.*, H.R. 4, 91st Cong. 1st Sess. (1969); H.R. 11750, 91st Cong. 1st Sess. (1969).

Among the witnesses who testified in Congress in support of such bills was then-Postmaster General Winton M. Blount, who strongly endorsed pending legislative proposals to grant postal workers "a statutory right to organize collectively and to bargain collectively with management on all of the matters . . . which their neighbors in private industry have long been able to bargain for." *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 536 (1969). President Nixon echoed this emphasis on collective bargaining when, in a message to Congress, he recommended "[t]otal reform of the nation's postal system" to include

> for the first time in history, true collective bargaining in the postal system. Postal employees in every part of the United States will be given a statutory right to negotiate directly with management over wages and working conditions. A fair and impartial mechanism—with

> provision for binding arbitration—will be established to resolve negotiating impasses and disputes arising under labor agreements.

Message from the President of the United States (May 27, 1969), *reprinted in* 115 Cong. Rec. 13,881-82 (1969).

Congress enacted the PRA following an unprecedented nationwide postal employee strike in March 1970. *See* H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3651. "Events of last March," a House Report on the PRA bill explained,

> however deplorable they may be, have finally established that a basic change in postal labor relations is overdue. Although contemporary labor relations in the private sector of the national economy have not been free of problems, they add up to a triumphant success as compared with those in the Postal Service. Generally speaking, [the PRA bill] would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters—including wages and hours—which their neighbors in private industry have long been able to bargain for.

Id. at 13-14, 1970 U.S.C.C.A.N. at 3662 (emphasis added).

Representative Udall, a member of the House Post Office and Civil Service Committee and a sponsor of the PRA, explained that the postal employee

> will be able, for the first time, to collectively bargain for his wages, benefits, and working conditions with management. No other Government employee will have such opportunities. With the singular exception of the right to strike, our new postal employee will be identical to his counterpart in the private sector in this respect . . . . We are truly creating a new kind of Federal

> employee . . . giving him collective bargaining—with binding arbitration as his last resort—identical to the private enterprise employee.

116 Cong. Rec. 20,229-30, 27,604-05 (1970).

In sum, a core aim of Congress in enacting the PRA was to improve postal labor relations by establishing a regime of collectively bargained terms of employment for this "new kind of Federal employee." Congress clearly sought that, whenever possible and appropriate, collective bargaining rules and procedures should govern postal employees. Applying a collectively bargained rule to postal employees in MSPB cases, as the court below in effect did, thus furthers the goals of the PRA.

II. UNDER THE PRA, NO PRESUMPTION EXISTS THAT DISCIPLINE ISSUED BY USPS MANAGEMENT IS PROPER

In support of its position that the MSPB be permitted to rely on grieved but not yet arbitrated prior discipline, USPS argues that discipline that its management issues to employees should, pending arbitration, be presumed proper. USPS Brief at 38-39. To support this argument, it cites cases for the proposition that government officials are presumed to "perform their duties properly and in good faith." *Id.* at 39. The flaw in this argument is that when USPS management disciplines a postal employee, it is not acting as the government, but as an employer of an enterprise that Congress sought to structure as closely as possible to a private-sector company.

The legislative history of the PRA indicates that Congress deliberately sought to divest USPS management of governmental status in its labor relations, by requiring it to bargain collectively on an even playing field with the representatives of its employees. As the House Report on the PRA bill explained, it was Congress' intention to "bring

postal labor relations within the same structure that exists for nationwide enterprises in the private sector." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 13, *reprinted in* 1970 U.S.C.C.A.N. at 3662; *see also Winston*, 585 F.2d at 202 (noting bills that led to PRA were intended to "replac[e] the procedures of traditional government labor relations with those of the private sector").

The 1962 executive order that granted postal unions limited collective bargaining rights reserved to the Post Office broad and absolute prerogatives over matters of postal employment. *See* Executive Order 10,988, § 7(2)(a)-(f), 27 Fed. Reg. 551, 554. The PRA reversed this, expressly subordinating management rights to the requirements of collective bargaining agreements. *See* 39 U.S.C. § 1001(e); *see also* H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 28, *reprinted in* 1970 U.S.C.C.A.N. at 3677 ("The exercise of these management rights is made subject to the terms of whatever collective bargaining agreements may have been entered into").

During floor debates on the PRA, Senator McGee, chair of the Committee on Post Office and Civil Service, explained Congress' rationale for removing the mantle of government authority from postal management:

> Delivering the mail is simply not in the same category of policymaking and program-development as foreign policy, national defense, housing, highway construction, or health and education assistance to State and local governments. It is an essential, *business-oriented* service. The committee has no intention of establishing any postal system which does not have direct and continuing responsibility to the people and to Congress, but we do believe that its roles can be fulfilled with a greater degree of efficiency if it is *removed from the ordinary channels, administrative controls, and legislative restrictions of other agencies in the executive branch.*

116 Cong. Rec. 21,709 (1970) (emphasis added).

Because the PRA puts USPS management on the same plane as a private-sector employer in labor relations matters, any presumption of the correctness of *government* action has no application to discipline USPS management issues to postal employees.

III. THE DECISION OF THE COURT BELOW FURTHERS THE POLICY OF THE PRA TO PROVIDE ADDITIONAL PROTECTION TO VETERANS

As noted above, labor arbitrators deciding discharge cases under the NALC-USPS collective bargaining agreement do not rely on prior discipline that has been grieved but not yet arbitrated. To allow the MSPB to rely on such prior discipline in removal cases concerning veterans or other preference eligible USPS employees would be to put those veterans who choose to appeal to the MSPB in a potentially worse position than their fellow postal employees whose discharge cases are heard in arbitration. Such a result would be inconsistent with the PRA, a statute in which Congress singled out preference eligibles as having *more*, not less, protection, than other postal employees. *See* 39 U.S.C. § 1005(a)(2) (PRA providing preference eligible postal employees with appeal rights); H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 10, *reprinted in* 1970 U.S.C.C.A.N. at 3658 (noting same); 116 Cong. Rec. 22,337 (1970) (Sen. Hartke supporting amendment that became § 1005(a)(2)); *American Postal Workers Union and USPS*, Case No. H7C-3D-D 13422 (1991) (Snow, Arb.) (copy lodged with Court), slip op. at 19 (noting that preference eligible employees are "favored"); *American Postal Workers Union and USPS*, Case No. AB-W-11 (1976) (Gamser, Arb.) (copy lodged with Court), slip op. at 8 (noting preference eligible employee "has been afforded special and unique protection against an adverse action"). In particular, in cases involving the right to appeal discharges, labor arbitrators have rejected results that

would place preference eligible employees in a worse position than other postal employees. *See USPS and NALC*, Case Nos. D90N-4D-D 950003945, 61 (1997) (Snow, Arb.) (copy lodged with Court), slip op. at 14 (rejecting result that would leave preference eligible employees with "fewer rights"); *NALC and USPS*, Case No. NC-W-4391D (1977) (Gamser, Arb.) (copy lodged with Court), slip op. at 15 (rejecting result that would place preference eligible employee "in a more vulnerable position than a non-preference eligible employee"). Because the decision of the court below applied to veterans and other preference eligible USPS employees in MSPB cases the same favorable rule applicable to postal employees under the collective bargaining agreement, it accords with the PRA policy of protecting and promoting the employment rights of veterans.[2]

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[2] In support of its claim that the MSPB should be permitted to rely on grieved but not yet arbitrated prior discipline, USPS argues that, should the prior discipline be reversed in arbitration after the employee's removal is sustained by the MPSB, the employee can move to re-open the MSPB case. USPS Brief at 24. Respondent correctly challenges this argument, as it assumes that following the MSPB decision sustaining the employee's removal, the employee can proceed to arbitrate prior discipline. It is doubtful an employee like Respondent, whose employment is governed by the NALC-USPS collective bargaining agreement, has such a right. A 1990 national-level NALC-USPS arbitration award holds that pre-discharge grievances do not survive after the discharge becomes final. *See USPS v. NALC*, Case No. H7N-5P-C 1132 (1990) (Mittenthal, Arb.) (copy lodged with the Court), slip op. at 7. The collective bargaining agreement carves out an exception to this holding only for *nondisciplinary* grievances. *See* Memorandum of Agreement "Re: Processing of Post-Removal Grievances" in 1998-2001 NALC-USPS collective bargaining agreement, available at *www.nalc.org/cau/pdf/agreemnt/na1998.pdf*, at p.185. Accordingly, while an employee may have the right to seek to re-open an MSPB proceeding if prior discipline is reversed, such a right is meaningless if—as may well be the case with postal employees represented by NALC—the employee has no right to proceed to arbitration to obtain the reversal of the prior discipline.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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June 28, 2001